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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENT.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 110-113) is reported in 140 F. 2d 488.

STATEMENT OF THE CASE.

Petitioner, in its Statement of the Case, correctly sets forth the pleadings but fails to accurately inform the Court of the facts of the case. We, therefore, submit the following summary as our Statement of the Case.

This is an action brought by the Respondents to recover damages for a breach of contract by the Petitioner in refusing to permit the Respondents to start work at the designated starting times set out in the "schedule", or agreement, entered into with the Respondents by the Petitioner. The Petitioner filed a motion to dismiss and for summary judgment supported by affidavits. Respondents filed counter-affidavits which controverted several of the pertinent facts set out in the Petitioner's affidavit. Petitioner herein, in its motion to dismiss, set up a plea of release and a plea of *res judicata*. The plea of release was predicated upon a letter signed by the General Chairman and General Secretary of the Brotherhood of Railroad Trainmen, of which the Respondents were members. Respondents contend that the letter was not a release of the personal claims they had against the Petitioner, because the letter was not signed by all of the necessary officials of the Brotherhood of Railroad Trainmen, contrary to the By-laws thereof, of which the Petitioner had knowledge. The further objection to giving effect to the letter was that it was signed without the authority or knowledge of the Respondents. Further, that it could not act as a valid release because there was no consideration therefor, and there was no meeting of the minds of the contracting parties.

The alleged plea of *res judicata* set up a decision of the National Railroad Adjustment Board, which decision was predicated upon claims that had been filed by one of the officials of the Brotherhood, without the authority or knowledge of the Respondents, for the individual claims the Respondents had by reason of the breach of their contract with the Petitioner. This decision was adverse to the Respondents. The *"Board"* found that the letter, aforesaid, which had been pleaded by the Petitioner before the *"Board"*, was a release of liability.

Respondents filed a motion to strike the motion of the Petitioner and set out, therein, that there were may issues of fact only triable by a jury.

Respondents contend that the affidavits filed raised opposing questions of fact pertaining to the case and that, therefore, the case should have been tried by a jury rather than determined on a motion for summary judgment.

The Lower Court sustained the motion and entered an order dismissing the complaint.

An appeal was taken to the U. S. Circuit Court of Appeals, Seventh District, and therein certain errors were set forth; being the Court's considering the letter to be a release; that the decision of the "Board" was final; in failing to hold that Section 153-(m) and (p) of the Railway Labor Act was unconstitutional, and in granting the motion for summary judgment.

Prior to July 24, 1934, the Respondents herein had been employed by the Standard Oil Company, Whiting, Indiana, to perform private switching in their yard at Whiting. On July 24, 1934, they entered into an agreement with the Petitioner, through the officials of the Brotherhood of Railroad Trainmen, (which we will subsequently refer to as the B. of R. T.) which agreement or "schedule", as it is called, had been received as Ex. H, of the Petitioner in the United States Circuit Court of Appeals in accordance with its order of July 26, 1941. Article 6 of said "schedule" concerns the starting times when the Respondents herein were to begin work for the various yard crews, the Whiting yard included. Contrary to said agreement, despite the repeated protests of the Respondents, the Petitioner refused to make available switch engines for the Respondents at the times designated in Article 6 of the "schedule". (Ex. H aforesaid.)

Respondents filed many complaints objecting to the refusal to abide by Article 6, with the local officials of the Petitioner and through the local officials of the B. of R. T. with the Petitioner, and time slips were made out (R. 47, par. 10, p. 48, par 13). Subsequently, at a meeting of the B. of R. T., authority was given to the B. of R. T. officials by Respondents, and others working at the Whiting yard, to file a complaint with the National Railroad Adjustment Board to require the Petitioner to comply with Article 6. Thereafter, on November 23, 1936, the same was filed (Doc. 3537, R. p. 14, 15).

The complaint filed with the National Railroad Adjustment Board, hereinafter referred to as the "Board", as aforesaid, was in accordance with the Constitution and By-Laws of the B. of R. T. (Par. 5, 6, and 7, Ex. G, a copy of which had been filed with the United States Circuit Court of Appeals, in accordance with the order entered July 26, 1941), which Exhibit had been offered by the Petitioner herein.

Subsequently, on October 31, 1938, without any notice or authority, and without any consideration to the Respondents, the General Chairman and the Secretary of the B. of R. T. consented, in writing, on a letter executed by the Petitioner, (R. 16-23) to the compromising of 61 separate cases then pending before the National Railroad Adjustment Board. Eleven of these cases involved grievances against the Petitioner herein, including the grievance, being case No. 5 (R. 17). Fifty of the matters contained in said letter involved specific claims for money for eighty-five or more individuals, four of which involved personal injury claims (cases nos. 46, 47, 48, 54, R. p. 22). In and by said letter the Petitioner herein agreed in the future to abide by Article 6.

That under rule No. 3 of the Constitution, and general rules of the B. of R. T. (Ex. A, R. 50), the whole general grievance committee could not revise or change a general wage "schedule" or agreement concerning rates of pay, nor working conditions, unless authorized to do so by a majority vote of the lodges, or by a majority vote of the membership in the system. The general grievance committee consists of the General Chairman, the General Secretary and the Local Chairman (Constitution and General Rules of the B. of R. T., Ex. G of the Petitioner heretofore filed, p. 166, par. 7 lines 10-23). These three men did not sign the letter (R. 23). It is signed by C. H. Williams, the General Chairman, and S. F. Johnson, the Secretary.

On May 18, 1939, without any authority or knowledge of the Respondents (R. 44, par. 3-A), General Chairman Williams filed claims for money for the Respondents herein before the *"Board"*. Thereafter an award was made thereon denying the same (Ex. F, R. 26-39).

That while said alleged claims of Respondents herein were then pending, the Brotherhood of Firemen and Engineers filed a claim with said *"Board"*, involving the identical subject matter of the Respondents herein, and an award was made in the employee's favor by said *"Board"*. (R. 52, Ex. B).

Neither Chairman Williams nor Secretary Johnson had any authority from the Respondents herein to waive, or give any release for, any individual claims of the Respondents (R. 49, par. 19). They failed to notify the Respondents and other members of Lodge 281 of their "settlement of claims" (R. 49, par. 20), as required by the By-Laws of the B. of R. T. (R. page 51, rule 8½). Respondents contend that Williams, as General Chairman, being one of the signers of the letter of October 28, 1938, aforesaid, did not consider said letter a waiver of the individual claims

of Respondents, for he did not notify Respondents of any settlement in accordance with the rule aforesaid, and a short time after the execution of said letter, without the knowledege of the Respondents, filed the individual claims before the "Board". (R. 26).

SUMMARY OF ARGUMENT.

A summary judgment cannot be rendered where there are contested issues of fact. Respondents maintain that the following were contested issues of fact in the instant cause:

1. Were the officials who executed the purported release, being the letter of October 28, 1938 (R. 16) authorized and empowered to issue any release of the individual claims of the respondents herein.

2. Did said officials of the B. of R. T. act as agents of the Respondents herein in filing any individual claims with the National Railroad Adjustment Board.

3. Was there a meeting of the minds of the respective parties who signed the letter, as required by law of contracts, so that the letter of October 28, 1938, could be considered a valid contract. The position of the Respondents being that there was no meeting of the minds on any release of individual claims of Respondents herein, because shortly thereafter, Williams, one of the signers, filed claims for time with the Railroad Adjustment Board.

These questions of fact were controverted, and under the law must necessarily be submitted to a jury for decision. Therefore, the allowance of the motion for summary judgment was in error.

If Williams and Johnson, the officials of the B. of R. T., were not authorized under the By-laws of the B. of R. T., nor specifically, by these Respondents, to sign a release for their individual claims, and there is no presumption in law that they could so act as their agents, then the letter of October 28, 1938, (R. 16) could not, and should

not, be considered as a valid release of the individual claims of the Respondents herein.

The officials of a union do not have authority *ipso facto* to waive, nor release, the individual rights of the members of the Union.

The so called release pleaded by the Petitioner herein, being the letter of October 28, 1938, (R. 16) could not be considered a valid release of itself because of lack of authority in the signers to represent the Respondents herein. There was no consideration received by the Respondents to support a release. The letter itself by its terms does not purport to be a release of the individual claims of the Respondents, but rather refers to the claims for money on other claims therein set forth.

The award, pleaded by the Petitioner herein, of the National Railroad Adjustment Board, denying the individual claims of the Respondents herein to damages, by reason of the Petitioner's breach of Article 6, cannot be considered as *res judicata* of the Respondents' claims.

The "Board" lacked jurisdiction over these Respondents in the case as pleaded by the Petitioner herein. First, because the claims were filed by Williams without authority or knowledge of the Respondents herein (R. 48, par. 14, 15, 16). Second, because there was no notice of any hearing or the pendency of the hearing given to the Respondents herein. (R. 48, par. 17).

Section 153 (M) and (P) of the National Railway Labor Act must be held unconstitutional as controvening the Fifth Amendment to the Federal Constitution as being a violation of due process of law. The employer or carrier under the Act is given a right of review in the event the decision of the "Board" is against it. After an order is entered by the "Board", requiring the carrier to perform

any act, it may refuse to do so, and the remedy of the employee is the filing of a suit in the District Court based upon the award. The ensuing trial is a trial *de novo*. Thereby the carrier obtains a review of the award.

If the employee is unsuccessful before the "Board", its decision is against him, he has no redress.

We submit that such a procedure is unconstitutional.

ARGUMENT.

I.

Petitioner's motion to dismiss the complaint and for summary judgment was allowed in the lower court contrary to law.

Petitioner herein has adroitly evaded, in its points, the compelling fact decided by the United States Circuit Court of Appeals herein, namely, that in order for any court, or board, to render any binding decision, it must have jurisdiction of the parties. We maintain, in the instant case, that the "award" of the National Railroad Adjustment Board, pleaded by Petitioner herein as *res judicata*, is void for want of jurisdiction of the parties.

The Affidavits and Counter Affidavits (R. 11, 46, 61) filed in this cause in connection with the Motion for Summary Judgment and the Motion to Dismiss, presented controverted issues of fact. A Jury Trial had been requested at the filing of the suit. Therefore, the court was not empowered, nor authorized, to pass upon these facts on the hearing of a Motion for Summary Judgment, as the United States Circuit Court of Appeals finds, in its decision (R. 112). The main controverted facts were:

1. The question of authority of Williams, as Chairman, and Johnson, as Secretary, of the B. of R. T., as set out in the Counter Affidavit on the Motion to Dismiss (R. 45, Par. 11, 14, 15, 16, 19), to compromise any claims with the Petitioner, when they were only empowered to file a grievance to compel the Petitioner herein to abide by the terms of Article 6;

2. Whether or not Williams had authority to file any personal claims of the Respondents with the National Railroad Adjustment Board.

3. Whether or not there was a "meeting of the minds" between Williams and Johnson and the Petitioner in the letter of October 28, 1938 (R. 16), pleaded by the Petitioner as a release.

4. Whether a contract is supported by sufficient consideration is a question of fact and should be submitted to the jury.

We submit that all of the decisive cases on the point concur, in the enunciation of the law, that where there are contested issues of material facts, the court should not dispose of a case on a Motion for Summary Judgment, and that the only time a Motion for a Summary Judgment may be allowed is when the same is sustained by undisputed facts.

Consolidated Indemnity Company v. *Alliance Company*, 68 Fed. (2d) 21.

Klink v. *Chicago R. I. and P. Ry. Company*, 219 Fed. 457.

National Surety v. *Ellison*, 88 Fed. (2d) 399.

1st Nat'l. Bank v. *Conway*, 94 Fed. (2d) 736, certiorari denied by this court in 58 S. Ct. 1047.

Griffith v. *Mass. Mutual Life*, 96 Fed. (2d) 57.

Campana Corp. v. *Harrison*, 135 Fed. (2d) 334, 336.

Burley, et al. v. *E. J. & E. Ry. Co.*, 140 Fed. (2d) 488.

It is a fundamental principle of law, that in nearly all instances, the question of an agent's authority is a question of fact and should be passed upon by a jury.

In *Wisconsin and Arkansas Lumber Co.* v. *Day*, 35 Fed. 563 at 566, the Court said:

> "Ordinarily the question of whether an agent has apparent authority to act for his principal is a question for the jury, when the contract is not in writing.

This is but an application of the rule that even though the facts are undisputed, if different inferences may be reasonably drawn from these facts, the question is for the jury."

II.

The letter of October 28, 1938 could not be considered as a valid release of the individual claims of respondents.

(a) There was no authority for the execution of any release by the General Chairman.

General Chairman Williams, under the Constitution of the By-Laws of the B. of R. T., has limited power and authority, his duties and obligations are set out in the B. of R. T. Constitution (Exhibit "G" filed with the court under order of July 26, 1941, p. 166, par. 7). Among his duties is the filing of grievances or claims for, and on behalf of, members or groups or lodges or all of the lodges of the particular roads of the B. of R. T. In order for him to receive a grievance for handling it is necessary that the local lodge hear and determine the matter and after passing upon the same submit it to him for handling. The General Grievance Committee consisting of the General and Local Chairman of the Lodge, and the General Secretary consults with the General Superintendent of the System. After this Committee makes any settlement it is required that within 30 days they notify the Secretary of the Lodge where the Grievance originated, and the member or members affected thereby of such action in writing (B. of R. T. Constitution, p. 168, par. 8½). The Petitioner herein was well acquainted with this procedure and the rules and regulations of the Brotherhood, for it was the Petitioner herein who introduced the B. of R. T. Constitution as an Exhibit.

We respectfully submit that on the original grievance

filed with the Board (Case No. 3537, R. 13) the aforesaid procedure had purportedly been adhered to up to the point of the settlement claimed by the Petitioner. However, as will be noted by Petitioner's Ex. C (R. 16), the same was executed by C. H. Williams, as General Chairman, and S. F. Johnson, Secretary, but there is no signature of the Local Chairman as heretofore shown to be required.

As stated in the Affidavit of the Respondents, filed herein (R. 45, par. 14, 15 and 16), the only authority vested in Williams as General Chairman was to present a Complaint to the "Board" to comply with Article 6 by furnishing engines and work at the times therein specified.

The officers of the B. of R. T. have no authority to waive private rights. As this Court has confirmed in *Illinois Central* v. *Moore,* 112 Fed. (2d) 959 (reversed by the Supreme Court on other grounds, 61 S. Ct. 754 at page 965), the United States Circuit Court of Appeals stated:

> "The collective agreement as such is made, defended and changed by the union, but the rights of each employee under it *are his own* and he may waive or assert them himself as he sees fit." (Italics ours.)

And at page 966 held:

> "The seniority provision of a collective agreement is an important and valuable part of the individual contracts of employment made thereunder. It has been held the union cannot waive or destroy it."

In the case of *Piercy* v. *Louisville & N. Ry. Co.,* 248 S. W. 1042, the court stated, p. 1045:

> "The officers of such organizations (order of railroad conductors union) are, as to the individual rights of its members, not to be deemed as their agents—agreements between organizations between employees and their employer, and designated primarily for the individual benefit of the members of the organization, *and not to place it within the power of the organization to change or modify the contract at its pleasure, so as*

to affect the individual rights of its members theretofore secured by the agreement.

"If the right of seniority may be changed or waived or otherwise dispensed with by the act of a bare majority of an organization, to which the one entitled thereto is a member, it would be building upon a flimsy foundation of sand, which might slip from under him at any time by the arbitrary action of the members, possibly to serve their own selfish ends in displacing him.

"* * * his agreement did not contemplate the submission by him to that body of the determination of any question involving his personal rights. But here *we have a personal right acquired by him as against the railroad company under contract, and we have the Order of Railroad Conductors asserting the right to waive for him the benefits of that contract.* It could not have been in contemplation by a member of such organization that he agreed when he entered to submit to the order for decision a controversy involving his rights as against a third party." (Italics ours.)

In the case of *Panhandle Ry.* v. *Wilson,* 55 S. W. (2d) 216, p. 219, conversely to the instant case the court stated:

"The rule is that individual members of a labor union are not bound by the contract between the union and the employers unless such agreements are ratified by the members of the union as individuals, and that in the absence of evidence of such ratification by a member, no rights accrue to him which he can enforce against the employer."

We submit that no rights of the members can be alienated without the member's consent, as the "Board" and lower Court did in the instant case.

We believe the case of *McCoy* v. *St. Joseph Belt Ry. Co.,* 77 S. W. (2d) 175, to be impelling in the instant case where the court states at p. 178:

"The evidence in plaintiff's favor is further to the effect that without any authority from the men, he

sought to change the seniority rights and positions of the employees of defendant, over their objections, including plaintiff.

"The evidence in plaintiff's favor is further to the effect that it was never agreed by the committee either to consolidate the lists or to change any working arrangements, nor was any vote taken on these matters, and the matters stated as agreed to in the letter above mentioned were not agreed to at all. In fact, no notice was given to the men's committee or to plaintiff of the change, other than the posting of the notice in the yards as aforesaid.

"Nor is there evidence that defendant's manager ever secured from the committee of defendant's employees, either orally or in writing, consent that the seniorities of defendant's employees might be changed to conform to the consolidated list, nor that such an agreement was made with defendant's employees either individually or as a group.

"There is nothing in the record from which it can be inferred that he individually participated in the making of the contract, or that he thereafter ratified it."

Page 182:

"The evidence in behalf of the latter sufficiently tends to show, and to authorize the jury to believe, if they did, that *what McQuaid did in composing the consolidated seniority list was merely his own unauthorized act without consulting those empowered to make such change, and defendant acted upon his said unauthorized act and made no investigation of his authority, nor made any effort to repair what was done when it learned the true fact about the matter.* But even if he did, *there is no evidence of any authority in the B. of R. T. to change or modify the contract so as to affect the individual rights of a member which rights were theretofore secured by the contract.*" (Our italics.)

See also the case of *Ahlquist* v. *Alaska, etc.*, 39 Fed. (2d) 348.

Certainly, a right to damages is as valuable a right as a seniority right, and we believe the court should not fail to follow these decisions in holding that a union, nor its officials, cannot waive or destroy it.

To hold otherwise would subject the millions of members of the various unions throughout the country to the whim or fancy and dishonesty of their officials and make uncontrollable dictators of them. We sincerely believe that such is not the intent nor the purpose of the union movement in this country, nor is it the intent or purpose of the courts of this country to so clothe them with such authority.

We also submit the case of the *Henry S. Grove*, 22 Fed. (2nd) 444, at page 446, paragraph 5 thereof, wherein the Court in passing upon an analogous situation to the instant case said:

> "Courts should frown upon any attempt made by employers of large numbers of laboring men to curtail their legal remedies and shut them off summarily from access to the courts, in the absence of a showing of complete mutuality. Large corporations, and especially insurance companies, are often too prone to take advantage of a situation, difficult even for the technician to understand."

We believe this last phrase is particularly pertinent to the facts in the instant case. See also *Burke* v. *Monumental Div.*, 273 Fed. 707.

If the so-called compromise agreement of the Petitioner—and we repeat, the Petitioner—which was drafted by them, was entered into without authority by the parties supposedly representing the Respondents herein, then it was invalid, and in that event the individual rights or claims of the Respondents cannot be lost thereby.

In Sub-Point E of Point II of Petitioner's brief they cite *Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705, in which the Court states:

> "It is settled law that members of an unincorporated

> voluntary association, like the Brotherhood, are bound by the determination of the association's tribunal *if the decision is reached after observance of the formalities it prescribes,* after fair opportunity of presenting their case, *where there has been no excess of jurisdiction,* no bad faith or capricious, unreasonable or arbitrary action." (Italics ours.)

which we respectfully submit is the exact status of the instant case, and we wish to emphasize at this point that nowhere in counsel's brief has he answered our previous contention that the two officials of the Brotherhood did not act officially, for they failed to comply with the rules and constitution of the Brotherhood.

We believe the instant case is on all fours with the quoted opinions and that, in right and justice, they should be followed by this court in affirming the order of the United States Circuit Court of Appeals herein.

(b) There was no consideration received by respondents.

There was no consideration of any kind passed between the Petitioner and the Respondents for the execution of a release (as contended by Petitioner in the letter of October 28, 1938). We believe this is self-evident from an examination of Petitioner's Ex. "C" (R. 16) Case No. 5 thereof. The only thing that was presented by the Local Lodge to Williams, the General Chairman of the Grievance Committee, and to the "Board" was "starting time of switch engines of Whiting S. O. Yard" as set forth in the letter. (R. 17.)

This controversy was settled by the parties by the following (R. 17):

> "Settlement by agreement that the starting times for a 90 day trial period commencing November 15, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of starting times heretofore agreed upon and now being followed. * * *"

There was no release of any individual claims of these Respondents and no consideration passed to these Respondents for any release, as no claims of these Respondents were presented, argued nor settled by the letter of October 28, 1938.

The "Board," in considering the unauthorized claims that Williams presented to them, considered this letter as a release of the individual claims of the Respondents herein, and we submit that the "Board" by so doing committed a grievous error and therein made the refusal of the award invalid.

Petitioner herein, has not, and we believe cannot ask this court to believe that the agreement to abide by the terms of Article 6, can be considered as a consideration in settlement of Respondent's individual claims, because the law is well settled that an agreement to do something, which a person is already legally bound to do, is not a sufficient consideration to support any agreement.

As was stated in an Illinois decision *Litwin* v. *Litwin*, 30 N. E. (2d) 619, at page 622:

> "* * * promising to do what she was already bound to do (referring to a consideration). A promise of that kind was not a sufficient consideration for the assignment."

In the case of *Ferryboatmen's Union of California* v. *N. W. P. Ry.*, 84 Fed. (2d) 773, the court there held that something a party is required to do is not a sufficient consideration to support a release. This decision also held that there must be a meeting of the minds of the parties to the agreement.

We respectfully submit that in the instant case there was no meeting of the minds. This is evidenced by the subsequent unauthorized filing of claims purportedly on behalf of these Respondents before the National Railroad Ad-

justment Board, by Williams. The same Williams who signed Exhibit "C" (R. 16), set up by the Petitioner as a release. He filed the individual claims for Respondents herein, unauthorized it is true, but we refer to it, to show that he himself, had not considered the letter a release of individual claims, thereby exemplifying the absence of a meeting of the minds, as exemplified by Williams' statement of claim (R. 29), filed with the "Board":

> "There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. *In fact that case held no claim for payment for time.* It was simply a case to settle the dispute as to the carrier's right to force the yard crews in the Whiting yard to work at times other than the fixed starting time provided for in Article 6. Certainly there are no words in the agreement reached which implies in any manner that the committee waived the right to claim for payment for violations prior to withdrawal of the case from the Board." (Italics ours.)

(c) It is self-evident from the contents of the letter that it is not a release of the individual claims of respondents.

From an examination of said letter (R. 16), as a whole, it is obvious that there were many cases pending involving the payment of money, but the only question these Respondents had pending on Case No. 5 (R. p. 17) was a grievance—"starting time of switch engines in Whiting S. O. Yard." (R. 17, case 5.)

The question of liability of the Petitioner for the payment of money on individual claims of these Respondents and others, was not presented in Labor Board Docket No. 3537, was not set out in the letter (R. p. 17), nor by any wording in the letter attributable to Case No. 5.

This court is too well aware of the multitude of cases holding that the wording of a contract or a pleading is held most strongly against the person drafting the same. We submit that the Petitioner herein drafted the letter (Ex. "C") (R. 16), and that if it had intended that said letter should act as a release of the individual claims of the Respondents herein, assuredly with the legal talent at their disposal, they could, and would, have clearly expressed that thought in clear, legal, understandable language.

From an examination of the letter we find that it enumerates 61 separate cases then pending before the National Labor Adjustment Board, between the Brotherhood of Railroad Trainmen, represented by C. H. Williams as Chairman and one of the other members of the Grievance Committee, and the Petitioners herein. Eleven of these cases involved grievances, including Grievance Case No. 5. Fifty involved claims for money for eighty-five or more individuals. Of these fifty, four involved personal injury claims. (Cases Nos. 46, 47, 48 and 54, R. 16.) All the others were time claims.

After examining all of these claims, it is evident that the wording of the concluding part of the letter could only adjust and compromise the *claims* then pending before the Board and submitted for settlement or compromise. We repeat, that the only thing pending before the Board as contained in said letter affecting these Respondents was a grievance, namely, to compel the Petitioner herein to abide by the terms of Article 6 of the agreement. (R. 14, Doc. No. 3537.) The question of liability of the Petitioner for the payment of individual claims to some of the Respondents herein was not presented to the "Board," enumerated in Case No. 5, discussed by the parties, mentioned in the letter specifically, nor by inference.

The fact that no one considered this letter as a release

of individual claims, we believe is evidenced by Williams a short time thereafter (R. p. 26) filing the unauthorized claims before the "Board," this, several months after the letter of October 31, and without the required authority of the local lodge, nor the Respondents, and without their knowledge.

We submit that it is self-evident that "claims" refer to claims for money, Ex. B (R. 15), as distinguished from "protests" or grievances as understood in the trade, and we therefore respectfully submit that neither the B. of R. T., nor the officials thereof, had the power or the right to compromise or waive any individual claims of the Respondents herein. The Petitioner was aware of the limited authority of Williams as Chairman of the B. of R. T., yet it interposed the letter as a release, when for the reasons heretofore stated there was no authority vested in Williams and Johnson to execute the same; the purported release was not executed by the three men required by the By-Laws of the B. of R. T.; there was no consideration to the Respondents, and the letter itself, from its contents does not purport to be a release of claims of these Respondents.

For this letter of October 28, 1938, to be a valid and substantial release of the claims of the Respondents herein, it is legally necessary that the following be present.

1. That there be competent parties.

We submit that we have shown the lack of authority in Williams and Johnson to act for or on behalf of the Respondent's individual claims. They were not the properly constituted committee provided for the purpose, by the B. of R. T.

2. There must be a proper subject matter.

We believe it is obvious that in the wording of the letter that the only matter pending between the parties and

before the "Board" was the grievance to compel the railroad, Petitioner herein, to abide by Article 6 of the Agreement. That subject matter cannot be transmuted to include the personal claims of these Respondents. There is therefore no proper subject matter.

3. Consent, or a meeting of the minds of the parties.

We believe we have illustrated that Williams himself, one of the parties to the Agreement, did not consider the letter a release of individual claims.

4. There must be a consideration.

Even the Petitioner, in the lower court, did not suggest that there was any consideration moving to these Respondents, from the Petitioner to validate the would be release. (See *Ferryboatmen's Union* v. *N. W. P. Ry. Co.*, 84 Fed. (2d) 773.)

Petitioner herein seeks to overcome all of the legal requirements of a well ordered and law abiding society, by its all embracing "collective bargaining"; such was not the intent nor purpose of unionism in America. And we respectfully submit that collective bargaining consists of obtaining rights, good working conditions, fair wages and just consideration for its members by the Unions, rather than the overriding of all legal precedent and the forfeiting of the members' individual rights.

III.

The award of the National Railroad Adjustment Board refusing to give effect to the individual claims of the Respondents herein is not res judicata of said individual claims.

(a) The Board had no jurisdiction of the individual Respondent's claims herein because there was no authority vested in C. H. Williams to present the same.

As stated in the affidavit (R. 45) the only authority vested in the General Grievance Committee, of which C. H. Williams was Chairman, was to present a grievance to the "Board" to force the Petitioner to comply with Article 6 (R. pp. 47, 48, paragraphs 11, 13, 14, 15, 16 and 19).

As heretofore enumerated under Point II (a), under the Constitution and By-Laws of the B. of R. T. of which the Petitioner had knowledge, the General Grievance Committee and the General Chairman, have limited authority. The cases and argument quoted under that point are applicable to the instant point, so we will not burden the court with a repetition thereof. However, we wish to state that under Rule 5 (Exhibit "G" heretofore filed herein under order of July 26, 1941) certain steps are necessary before any grievance or claim can reach the General Chairman, which was not done in the case decided by the National Railroad Adjustment Board upon which the Petitioner has pleaded *res judicata* (R. p. 26).

Certainly, a switchman, uneducated in the ways of law, releases, and authority, should not be held to have any greater power than an attorney at law, who is supposedly more learned in reference to rights and liabilities, and this court we believe without any citation being necessary will agree that an attorney without authority and without the

knowledge or consent of a client could not file a suit in his behalf and bind the client thereby.

We submit that in the instant case, the General Chairman C. H. Williams who took it upon himself to file individual claims for these Respondents without their knowledge or authority, cannot be held by that action to bind them.

If Williams did not have the authority to file the claim, then it must necessarily follow that the "Board" did not have jurisdiction of the claims nor of the parties. If they did not have jurisdiction then any order or award or refusal of award that might be entered by them would be void.

In the case of *Piercy* v. *Louisville Railway,* 248 S. W. 1042, the court held at page 1045:

> "The officers of such organizations (union) are, as to the individual rights of its members not to be deemed as their agents."

We wish to reiterate that the authority given to the representatives under the Act and under the constitution of the Brotherhood does not anywhere include the right to representation for "claims for pay or claims for breach of contract," but, on the contrary, only disputes concerning rates of pay, rules or working conditions.

We wish to submit the consensus of authority on this point as evidenced by 63 Corpus Juris, page 663, Par. 14:

> "A trade union is not the agent of a member for the purpose of waiving any personal right he may have, but only for the limited purpose of securing for him, together with all other members, the objects of the union."

The lower court, before whom this case was decided, previously held in the case of *Griffin* v. *Chicago Union Station,* 13 Fed. Supp. 722, p. 724, upon a claim that the member was represented before the "Board" by the Union; that

such was not the fact, that no notice had been given the complaining member as to his individual rights, and that those rights could not be waived or impaired by the action of the Union officials before the "Board." The same legal principle should have been applied in the instant case.

The Respondents do not deny that the officials of the Brotherhood were authorized to file a complaint before the "Board" to compel the Petitioner to adhere to Article 6 of its labor agreement. The officials' authority was limited to this act and purpose. The agency created was a limited or specific agency and was to be terminated as soon as the purpose for which the agency was created was served. The Petitioner apparently fails to realize that the authority which was conferred upon the aforesaid officials by the Respondents concerned the "specific performance" of Article 6 of the labor agreement and did not concern the individual rights of the various Respondents, the said individual rights of the Respondents arising out of the breach of the labor agreement by the Petitioner.

It is a well established legal principle that an agent who is appointed for a particular purpose is a special agent and his authority must be strictly construed and must be measured by express direction given by the principle. A person who deals with a special agent is ordinarily bound to ascertain the scope and extent of the special agent's express authority. See *N. Y. Life Ins. Co.* v. *Horton*, 9 Fed. (2nd) 320; *Monson* v. *Kill*, 144 Ill. 248; *Burba* v. *Baltic American Line*, 233 Ill. App. 132

(b) Respondents had no notice of any hearing nor of the pendency of any hearing.

As specifically set out in the U. S. C. A. 45 par. 153 (j), "Parties may be heard either in person, by counsel, or by other representatives, as they may respectfully elect, and the several divisions of the Adjustment

Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

We respectfully submit that the statute is mandatory upon the "Board" to give notice of all hearings to the employee involved in any dispute before them.

Nord v. *Griffin*, 86 Fed. (2d) 481, involves seniority rights which had been denied by the decision of the "Board", because of the unauthorized action of the Brotherhood in the presentation of the case. The Court held that by reason of lack of notice of the hearing, the employee was not accorded due process of law as guaranteed by the Fifth Amendment to the Constitution and, therefore, the order of the "Board" was void.

We respectfully submit that the instant case is in this respect analogous to the decision in the Nord case and that, therefore, the denial of the award by the "Board" in the instant case is void for lack of notice to these Respondents. (R. 48, par. 17, 18.) This fact is uncontroverted yet the Petitioner evades the same in their brief and seeks to gloss over it by the statement that "collective bargaining" justifies disregarding thereof, and states that the notice to the Union representative is sufficient.

(c) The award of the National Railroad Adjustment Board is not final because the statute under which said Board operates specifically excepts money awards from being final.

Even if these Respondents had given authority to the General Grievance Committee to file individual claims for them before the National Railroad Adjustment Board, and even though they had notice and knowledge of the pendency of said hearing, the award would still not be final. As our authority for said statement we submit that the Statute un-

der which said "Board" operates (U. S. Code Ann., Title 45, par. 153, sub-par. M) states:

> "and the award shall be binding upon both parties to the dispute except insofar as they shall contain a money award."

Petitioner construes this clause literally and submits to the court the proposition that unless an employee is actually awarded a cash sum by the Adjustment Board, the findings of said "Board" are final and binding and the employee has no right of review. We submit that the word "contain" as used in the statute actually means "concern," and that the statute should be construed to read, that the awards shall be final and binding, "except insofar as they shall *concern* a money award."

If Petitioner's contention is correct, it would mean that an employee who had petitioned the "Board" for a money award and who was unsuccessful in obtaining such an award, could not have the ruling of the "Board" reviewed. According to the reasoning in *Washington Terminal* v. *Baswell*, 124 F. (2d) 235, this is a violation of due process and the statute would be unconstitutional.

This Court is undoubtedly well familiar with the rule that if a statute is capable of two constructions, the courts will adopt a construction that will make the statute constitutional and valid. Therefore, we submit that our suggested construction of the statute should be adopted and followed.

Certainly, the award asked for by Williams was a money award, and though it was not awarded, it "contained" or "concerned" a money award.

As was stated in the case of *Illinois Central* v. *Moore*, 112 Fed. (2d) 959, at page 966 (reversed on other grounds, 61 S. Ct. 754):

> "The individual on his individual contract of em-

> ployment may seek reinstatement with pay through the railroad officers or through the Board, or he may, *before or after* pursue those remedies, acquiesce in the discharge, and ask damages for a breach of contract at law." (Italics ours.)

The court stated also in that case (p. 964), in referring to the handling of grievances or claims—

> "and then may be referred to the Adjustment Board. Awards are final except as to a money award." (Citing authorities.)

In the case of *Stephenson, et al.* v. *New Orleans & N. E. Ry. Co.*, 177 So. 509, wherein an award of the "Board" was pleaded as a defense, as in the instant case, the court said, p. 517:

> "Congress did not empower the Board to impair the obligations of an existing contract or to disturb the harmonious relations existing between a carrier and its employees."

It further states, p. 519:

> "Then most assuredly the employees of a carrier against whose interest and seniority rights an award has been made are not left without remedy in all the courts of the land."

And in commenting on the right of an employee to go to a court for relief despite an adverse decision by the "Board," the court states, p. 519:

> "Such an employee who has lost his cause before the Board must necessarily resort to a state court of competent jurisdiction or lose the property rights involved in a seniority contract with his employer, unless other Federal grounds are present."

We submit that in the instant case other Federal grounds were present, and we have appealed to the Federal Court for the assertion of a private right that could not be revoked by the adverse decision of the National Railroad Adjustment Board.

To the same effect see also:

System Federation v. *La. Ry.*, 119 Fed. (2d) 509.

See also:

Rentschler v. *Missouri Pacific Ry.*, 253 N. W. 694.

IV.

The Section of the Railway Labor Act Which Provides That the Award of the Adjustment Board Is Final and Binding, Except When the Same Contains a Money Award, Violates the Due Process Clause of the Fifth Amendment to the Federal Constitution.

We wish to respectfully point out to the court that under the Act under which the National Railroad Adjustment Board functions (U. S. Code Ann., Title 45, par. 153), when an award is entered against the employer and he refuses to comply therewith, it is necessary for the employee to file a suit at law, which is a trial *de novo*. The employer in that suit may set up any defense that he chooses, and in effect, obtain a review of the decision of the "Board."

If, however, the employer is successful before the "Board", and the award is entered against the employee, if said award is to be held a final adjudication of the rights of the party then there is no further remedy afforded to the employee.

This situation affords the employer a right of review of the decision of the "Board", and refuses the same right of review to the employee. We respectfully submit that this inequality violates the due process clause of the Fifth Amendment to the Constitution of the United States.

In the case of *Washington Terminal Co.* v. *Boswell*, 124 Fed. (2d) 235, on page 244, the court said,

> "Though the effects of an award favorable to an employee are substantial, they do not conclude the employer's rights."

> "The Board cannot enforce its awards. That is left for the courts to do. It can be done only in a suit *de novo*. In the suit the cause of action is upon the award, to secure its enforcement. But the parties are not limited by its provisions in the trial. The employee must set forth "the causes for which he claims relief" and the Board's order. 45 U. S. C. A. Sec. 153, First (p). The suit must "proceed in all respects as other civil suits," except that the order and findings "shall be prima facie evidence of the facts therein stated." Ibid. The carrier is limited in no way as to its defenses or the evidence it may wish to present. Its day in court in the enforcement suit is a full one . . . The short answer, therefore, to the argument that the administrative proceeding is wanting in due process is that, if so, this is entirely immaterial. Any failure in this respect is cured by the full and complete opportunity which the carrier is given in the enforcement suit to make its defense under all procedural and substantive guaranties of the Constitution."

This quotation unequivocally illustrates that an adverse decision by the "Board" does not conclude the employer's rights. On the other hand, however, an adverse decision by the "Board" against the employee does conclude the employee's rights.

On page 245, of the *Boswell* case, the court states,

> "If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted

his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might, therefore, have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different."

On page 246, the court said,

"And in this lies a stronger answer. It is the fact that unless the employee institutes an enforcement suit, the carrier cannot be prejudiced in any legal sense by the absence of an opportunity to sue. The only purpose of such suit would be to set aside or nullify the award. But this is not necessary for adequate protection of the carrier's rights. The award is not self-enforcing or enforceable by the Board. It is merely a decision that the carrier should change its operating practice in the manner specified. It has the power of management and if it regards the award as contrary to its rights, it can maintain the existing practices. The act confers upon the employer the powerful advantage of the defensive position in regards to the award. It places the burden of enforcement upon the employee. It limits the time within which he may act. The period allowed is not unreasonable. If he does not act within it, presumably his right to do so is gone. If not, he loses at any rate the special advantages of the statutory suit."

This quotation clearly illustrates the respective positions of a losing employer and a losing employee before the Adjustment Board. If there is an award against the employee by the Adjustment Board, he can, for all practical purposes, disregard the same because it is of no effect

whatsoever as far as he is concerned. On the other hand, if the "Board" makes any finding against the employee, the adverse ruling of the "Board" may constitute a complete destruction of the employees property rights.

On page 246, the court said, in speaking of the carrier's rights,

> "In all this there is no essential unfairness. Certainly, there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If he chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit."

In most instances, when a finding of the "Board" is against the employee, the latter loses certain property rights, and at the same time certain rights are given to the employer which he did not have prior to the decision or finding of the "Board". The employee has but one alternative, to accept the award of the "Board". On the other hand, if there is a decision against the employer, he has the choice of either accepting the award of the "Board" or rejecting the same. He does not have to comply with the award unless the employee files a suit in Court, predicated on such an award, and obtains the sanction of the Court. In other words, in the absence of any suit by the employee to enforce an award of the "Board" which is adverse to the employer, such award is absolutely meaningless. The statute denies the employee the more usual advantages of administrative decision, namely, immediate effectiveness, unless stay is secured, limitation of judicial review to questions of law, enforcement by public authority, etc. It gives him only decision, not action, by the "Board".

It puts upon him the whole burden of enforcement. If the employer has had his day before the "Board", and after it has lost, he is only confronted by an order, non-enforceable, except by suit. In fact, the employer is not only not denied his day in court, in the hearing before the "Board", but he is given another opportunity to have his day in court in the suit brought to enforce the award.

On page 251, the court said:

> "Finally, this is a suit for a declaratory judgment. The remedy is discretionary. We do not believe a carrier, consistently with the Railway Labor Act, could maintain a suit in equity to set aside an award or enjoin its enforcement. The statute seems clearly to exclude such suits by specifying enforcement suits solely as a *method of review.*" (Italics ours.)

In the dissenting opinion of Justice Stephens, on page 269, the following statement is found:

> "It would seem more logical to conclude that it would hardly have been the intention of Congress to exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the Board. Indeed, the argument that the carrier cannot have recourse to the Courts because employees losing before the Board cannot sue either under the Act or at all begs the very question in issue, to wit, whether the procedure provided for by the Labor Act is exclusive."

The decision in the *Boswell* case was sustained by this Court by an evenly divided opinion, Justice Rutledge not taking any part in the rendition of the opinion. This, we submit, should be indicative of the Court's attitude in the instant case. Despite the fact that the Railway Labor Act does give the employer the right of review (enforcement suit), four of the Justices of the Supreme Court felt that he should be given an additional or a more direct

right of review of the "Board's" award. Since this is the fact, we may reasonably conclude that the court should certainly favor the employees in the instant cause, who are not given any right of review whatsoever, by the Act in question.

This feeling about the unfairness of the Act to the employee is concurred in, in the case of *Stephenson* v. *New Orleans & N. E. Ry. Co.*, 177 So. 509, at page 519:

> "Neither the carrier nor the employee against whose interest an award has been made, is given any right under the Act to go into the United States District Court as a party plaintiff or complainant."

Also, the District Court in the case of *Lane* v. *Union Terminal*, 12 Fed. Supp. 204, at page 205, states:

> "The act is silent, insofar as authority is concerned, for any person to enter the national court, save and except the 'petitioner' or 'any person for whose benefit such award was made'. The defeated had no right to enter court. He is given no privilege of court review. It must be assumed that the right of the court to 'enforce the order or set aside the order' will be taken upon the application only of the parties who are permitted to enter court."

To the same effect, see also, *Cook* v. *Des Moines Union Ry. Co.*, 16 Fed. Supp. 810.

REPLY TO BRIEF OF PETITIONER.

We have shown that if it is found that the award of the "Board" denying the claims of the Respondents is final, then Sections 153 (m) and (p) of the Railway Labor Act are unconstitutional. (Brief.)

On page 15 of its brief, Petitioner states that "Notice to the duly constituted officers of the Brotherhood is sufficient," and cite *Estes* v. *Union Terminal Co.*, 189 Fed. (2d) 768, in support of their statement.

Section 153 (j) of the Railway Labor Act provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board *shall give due notice of all hearings to the employee or employees and the carrier or carriers* involved in any disputes submitted to them." (Italics ours.)

In *Estes* v. *Union Terminal Co., supra,* the Circuit Court of Appeals stated that it is absolutely imperative that an employee involved in any controversy before the "Board" be given notice of the hearing, and that in cases involving two large groups of employees, notice to the duly constituted officers of the organization would *generally* be sufficient. The case at bar does not involve large organizations of employees. The Court in stressing the importance of giving notice to an employee of a hearing before the "Board," stated:

> "• • • illustrates how a single employee may be caught between the upper and nether mill stones in a controversy to which only a labor organization and a carrier are parties before the board."

The *Estes* case does not lay down the positive rule of law that the serving of notice upon officials of a union is sufficient compliance with the terms of the Railway Labor Act as the Petitioner would have us believe. In fact, if any inference is to be drawn from the case, it should be to the contrary.

Petitioner places great emphasis on the case of *Berryman* v. *Pullman Co.*, 48 F. S. 542, which it cites on page 16 of its brief. The facts of that case are not analogous to the facts of the instant cause. In the *Berryman* case, the defendant filed an affidavit in support of its motion for a summary judgment, and the plaintiff admitted all the facts alleged in said affidavit. The plaintiff was properly represented before the "Board" and there was no question present involving the authority of his representative. There was no question present involving the jurisdiction of the "Board" over the subject matter and the parties to the action. There was no question present involving the giving of notice of the hearing by the "Board", to the parties to the suit. Finally, the *Berryman case* is a District Court case.

On page 28 of its brief, the Petitioner contends that the Respondents are not entitled to judicial relief because they have failed to exhaust their remedies before the tribunals of the Brotherhood.

The law is well settled that a person is not required to perform a useless act. The Respondents had no knowledge of the execution of the letter of October 28, 1938, nor of the filing of their individual claims before the "Board", until after the rendition of the adverse decision by the "Board."

Does the Petitioner wish to contend that after the "Board" decided the claims adversely to the Respondents herein, the latter should have sought relief before the

tribunals of the Brotherhood? Any such action by the Respondents would have been absolutely useless. We reiterate that the law does not require a person to perform a useless Act.

Petitioner, throughout its brief, attempts to inject collective bargaining into the case. We submit that collective bargaining is irrelevant to the issues. Collective bargaining pertains to the collective rights of labor and not to the individual rights of individual employees for damages.

In the case of *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 360, this Court declared that an employee has the election of filing his claim or grievance with the "Board", or filing it in a court of law. This right of election given to the employee negatives the contention of the Petitioner regarding collective bargaining.

Section 153(j) of the Railway Labor Act provides that in a hearing before the "Board",

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, * * *."

Section 151 of the Act provides, in part,

> "The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

By virtue of these two sections of the Act, an employee can represent himself before the "Board", or choose any representative he desires, his choice not being limited to a union organization, or to a union official or member. The very language and tenor of the Act negatives the argument of the Petitioner that collective bargaining is an issue in the instant cause.

On page 26 of its brief, Petitioner cites the case of *Smith, et al.* v. *Texas N. O. R. Co.*, 118 Fed. (2d) 75, as

supporting its theory that when a compromise agreement is executed with the designated representatives of the employees, all employees are bound thereby, and that the principles of common law agency are not applicable.

The quotation which the Petitioner cites from the *Smith* case glaringly illustrates its miscomprehension of the law enunciated in that case. The representatives of the union were not acting as agents of the decedent, but were acting as agents of the children of the deceased. The Court said,

> "The jurisdiction is persuasive that *they* were on notice and were *represented;* and, therefore, *their* rights were decided at the compromise between the employees as a group and the carrier." (Italics ours.)

The children of the deceased were properly represented by agents, and a careful reading of the quotation cited by Petitioner discloses that the children of the deceased may have been estopped from attacking the settlement. They had been given notice and did not act upon the same. The conclusion which the Petitioner draws from the *Smith* case is unwarranted.

Petitioner's arguments on the other points of its brief, we submit have been answered by our summation of the law in the brief, hence we shall not repeat them.

Conclusion.

We, therefore, respectfully submit that the Petitioner herein, presents no justiciable right to reverse the decision of the United States Circuit Court of Appeals; that they have correctly decided the issues presented and that this judgment should be affirmed.

Respectfully submitted,

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